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CROSSING SC, LP

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY**

In re:

BED BATH & BEYOND, INC., *et al.*,¹

Debtors.

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Chapter 11

Case No. 23-13359 (VFP)

(Jointly Administered)

**OBJECTION OF ROCKWALL CROSSING SC, LP. AND VISTA
PROPERTY CO. TO PROPOSED ADEQUATE ASSURANCE OF FUTURE
PERFORMANCE IN CONNECTION WITH DEBTORS' NOTICE OF
SUCCESSFUL AND BACKUP BIDDER WITH RESPECT TO THE PHASE
I AUCTION OF CERTAIN OF THE DEBTORS' LEASE ASSETS AND
ASSUMPTION AND ASSIGNMENT OF CERTAIN UNEXPIRED LEASES**

Vista Property Company, LLC and Rockwall Crossing, SC, LP (together "**Landlord**"), by
and through their undersigned counsel, respectfully submit this objection (the "**Objection**") to the

¹ The last four digits of Debtor Bed Bath & Beyond Inc.'s tax identification number are 0488. A complete list of the Debtors in these Chapter 11 Cases and each such Debtor's tax identification number may be obtained on the website of the Debtors' claims and noticing agent at <https://restructuring.ra.kroll.com/bbby>. The location of Debtor Bed Bath & Beyond Inc.'s principal place of business and the Debtors' service address in these chapter 11 cases is 650 Liberty Avenue, Union, New Jersey 07083.

proposed adequate assurance of future performance of the successful bidder on Landlord's Lease (defined herein) as set forth in the *Notice of Successful and Backup Bidder with Respect to Phase I Auction of Certain of the Debtors' Lease Assets and Assumption and Assignment of Certain Unexpired Leases* [Docket No. 1114] ("**Bidder Notice**"). In support of the Objection, Landlord respectfully represents as follows:

1. Rockwall Crossing, Ltd.² and Bed Bath & Beyond, Inc. ("**Debtor**", and together with its co-debtors, the "**Debtors**") are parties to that certain lease dated September 3, 2004 (as amended, the "**Lease**") for the shopping center property located at 963 East Interstate Highway 30 in Rockwall, Texas and known as Rockwall Crossing (the "**Property**"). A true and correct copy of the Lease, as amended, is attached hereto as Exhibit A.

2. On April 23, 2023 (the "**Petition Date**"), the Debtors filed their voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the "**Bankruptcy Code**") before this Court.

3. On May 22, 2023, the Court entered its *Order (I) Establishing Procedures to Sell Certain Leases, (II) Approving the Sale of Certain Leases, and (III) Granting Related Relief* [Docket No. 422] (the "**Lease Sale Procedures Order**") whereby the Court approved certain procedures by which the Debtors were authorized to conduct one or more auctions for the sale of certain unexpired leases of nonresidential real property where the Debtors were currently leasing and operating stores.

4. On May 25, 2023, in accordance with the Lease Sale Procedures Order, the Debtors filed their *Notice of Lease Auction and Potential Lease Sale Hearing* [Docket No. 456], which provided notice to Landlord, among other parties, of the potential auction and sale of Landlord's

² Predecessor-in-interest to Landlord.

Lease, among others, at a “Phase I” auction (the “**Auction**”) to be held on June 26, 2023.

5. On June 26, 2023, the Auction was held, and the Lease was offered for sale to the highest qualified bidder. The successful bidder for the Lease at the Auction was determined to be Burlington (“**Successful Bidder**”), with Havertys serving as the backup bidder (“**Backup Bidder**”).

6. On June 27, 2023, the Debtors filed the Bidder Notice, formally identifying the Successful Bidder and the Backup Bidder. *See* Bidder Notice at p. 11.

7. Successful Bidder Burlington is a retailer of discount clothing and apparel for men, women and children. *See* <https://www.burlington.com>.

8. Section 13.3 of the Lease expressly requires that the Debtor, as tenant, must honor certain exclusivity provisions granted to other tenants at the shopping center Property. Specifically, among these exclusivity provisions are those granted to tenant TJ Maxx, which require, among other things, that “no other premises in the Shopping Center shall at any time contain more than fifteen thousand (15,000) square feet of floor area therein used or occupied for, or devoted to, the sale or display of apparel and related accessories[.]” (a “**Competing Use**”). *See Exhibit A* at section. 13.3, p. 48 and at Exhibit K-4-1 through K-5-1.

9. The Lease provides for the Debtors’ use of twenty-three thousand (23,000) square feet of space at the Property. Leasing space of this size to Burlington, the Successful Bidder and proposed successor tenant, who is a purveyor of apparel, would be Competing Use, and a clear violation of the Debtor’s obligations to honor the exclusivity provisions under Section 13.3 of the Lease and a violation of the Landlord’s obligations to its current tenant, TJ Maxx.

10. Recognizing that exclusivity provisions such as the one provided to TJ Maxx by Landlord are common in shopping center leases, the Bankruptcy Code imposes heightened

requirements for the assumption and assignment of leases of real property in shopping centers. Among these requirements is that, in order for the debtor and its proposed assignee-tenant to demonstrate adequate assurance of future performance under a shopping center lease, they must establish:

[T]hat assumption and assignment of such lease is subject to all the provisions thereof, including (but not limited to) provisions such as a radius, location, use or exclusivity provision, and will not breach any such provision contained in any other lease, financing agreement, or master agreement related to such shopping center[.]

11 U.S.C. § 365(b)(3)(C). The purpose of this provision “to preserve the landlord's bargained-for protections with respect to premises use and other matters that are spelled out in the lease with the debtor-tenant.” *In re Toys “R” Us, Inc.*, 587 B.R. 304, 309 (Bankr. E.D. Va. 2018) (quoting *In re Trak Auto Corp.*, 367 F.3d 237, 244 (4th Cir. 2004)). The section does not bestow new contractual rights upon landlords, but rather preserves exclusivity provisions with other tenants that would otherwise be at risk of being stricken as *de facto* anti-assignment provisions under a lease. *See Toys “R” Us, Inc.* at 310.

11. Unless the Successful Bidder can provide a waiver or other release from TJ Maxx of its right of exclusivity, the Debtor cannot demonstrate adequate assurance of future performance under the Lease. The assumption of the Lease and assignment to Burlington will violate the exclusivity provision that the Debtor is obligated to honor pursuant to section 13.3 of the Lease and will likewise cause Landlord to violate its existing obligations to its other tenant, TJ Maxx, as prohibited by section 365(B)(3)(C) of the Bankruptcy Code. Absent an express waiver or other agreement by TJ Maxx to allow Burlington to occupy the Property and sell apparel in contravention of its bargained-for exclusivity (which Landlord cannot compel), Landlord objects to the adequate assurance of Successful Bidder Burlington’s future performance under the Lease.

Accordingly, in the absence of any such agreement or accommodation by TJ Maxx, Landlord would request that the Court require the Debtor to assign the Lease to Havertys, the Backup Bidder at the Auction, who is a purveyor of home furnishings, rather than apparel, and whose occupancy of the Property would not be a Competing Use with TJ Maxx in violation of the Lease and Section 365(b)(3(C) of the Bankruptcy Code.

WHEREFORE, Landlord respectfully requests that the Court enter an order (i) requiring the Debtors to comply with Section 13.3 of the Lease, (ii) require that the Debtors assign the Lease to the Backup Bidder or some other qualified tenant that will occupy the Property without a Competing Use in violation of the Lease and the exclusivity provided to TJ Maxx; and (iii) for such other and further relief to which Landlord may be justly and equitably entitled.

Dated: July 11, 2023

Respectfully submitted,

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